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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 651

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND OR THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND OR THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

The petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered on the 1st day of June, 1967, which affirmed the dismissal of the complaint of the above named petitioners, without prejudice to any new suit which petitioners might be advised to initiate in the event of altered circumstances.

Opinions Below

The decision of the Court of Appeals of the State of New York was without opinion, and it is reported in 19 N. Y. 2d 1004, and it is printed at pages 29 of the Appendix hereto.

The opinion of the New York Appellate Division, Second Judicial Department, is reported in 26 A. D. 2d 838 (N. Y.), 274 N. Y. Supp. 2d 416, and it is printed in the record below at page R73.

The opinion of the New York Supreme Court, Kings County, is reported in 49 Misc. 2d 344 (N. Y.), 267 N. Y. Supp. 2d 444, and it is printed in the record below at pages R64-68.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on June 1, 1967.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(3).

Upon application by counsel for petitioners, dated August 28, 1967, an order was made on September 1, 1967, by Hon. Hugo L. Black, Associate Justice of the Supreme Court of the United States, extending until September 30, 1967, the time of the petitioners for filing a petition for a writ of certiorari in this case. A copy of the said order is printed at page 30 of the Appendix herein.

On July 7, 1967, the Court of Appeals of the State of New York amended its remittitur herein by adding thereto the following statement, which is printed in the Appendix herein, at page 29 .

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Plaintiffs contended that, in the payment to them for their services as elementary school principals of salaries which were lower than those paid to principals of newly created intermediate schools, they were deprived of the equal protection of the laws and of their property without due process of law in violation of their rights under

the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no constitutional impairment of any property rights of plaintiffs."

Constitutional and Statutory Provisions and Regulations Involved

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 2(7) of the New York Education Law provides:

> "The term 'secondary education' means instruction of academic grade, between the elementary grades and the college or university."

Section 3102(1) of the New York Education Law, in part, provides:

> "The school authorities of each school district of the state employing eight or more teachers shall adopt by-laws fixing salary schedules for all full-time teachers, * * *."

On May 27, 1965, section 117(9) of the Regulations of the New York State Commissioner of Education was amended to read as follows (officially reported in 8 NYCRR 80.1; printed in the record below at p. R57):

> "9. Extension of Certificate Validity
>
> a. Any school district which proposes an experiment concerned with organizational changes that alters the

definition of the elementary, junior or senior high school may be granted approval for a five year period to employ a certified teacher (or appropriately licensed teacher in the cities of New York and Buffalo) for any teaching assignment, within the scope of the experiment, for which the teacher is deemed, by the superintendent, or other legally authorized body, qualified by education and experience provided: (1) The proposed experiment is approved by the Board of Education upon the recommendation of the professional staff of the school district, and (2) The proposed experiment is approved by the Commissioner of Education, and (3) The proposed experiment includes appropriate procedures for evaluation.

b. Permission to assign teachers in accordance with the terms of the experiment may be renewed for a five year period on evidence, satisfactory to the Commissioner of instructional benefit to the children."

On June 14, 1965, the respondent adopted resolutions (printed in the record below at p. R61):

"RESOLVED, That the Board of Education, pursuant to Article XV, Section 117 of the Regulations of the Commissioner of Education, as amended on May 27, 1965, hereby reaffirms its approval of the aforesaid program submitted by the Acting Superintendent of Schools, and be it further

RESOLVED, That subject to the approval of the Commissioner of Education, the Acting Superintendent of Schools be, and he is hereby authorized, to make such assignments of personnel as are required to accomplish the purposes of the aforesaid program, including assignments of junior high school personnel declared appropriate by the Board of Examiners as hereinabove set forth, and be it further

RESOLVED, That any inconsistent provisions of the By-laws of the Board of Education be and the same hereby are suspended during the conduct of the aforesaid program."

Questions Presented

1. Did the respondent school board unconstitutionally deprive the petitioners of the equal protection of the laws, and of their property without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States, by paying them lower salaries for their services as principals in its elementary schools, than the salaries that the respondent paid to other principals serving in its newly formed "intermediate schools", which gave instruction in the same grades 6 to 8, as the elementary schools, and followed the same courses of instruction, using the same text books, and the same tests?

2. Were there substantial differences between the officially prescribed duties and qualifications of principals in respondent's elementary and intermediate schools, that supplied a reasonable basis for classifying elementary school principals in a lower pay scale than intermediate school principals?

3. Did an amendment of the Regulations of the State Commissioner of Education permitting school districts to propose "an experiment concerned with organizational changes that alters the definition of the elementary, junior or senior high school", and "to employ a certified teacher * * * for any teaching assignment, within the scope of the experiment", and the suspension of respondent's by-laws, justify the payment of lower salaries to elementary school principals than to intermediate school principals for their aforesaid services in their aforesaid respective types of schools?

Statement of the Case

A. The Facts

Section 2(7) of the New York Education Law defined "secondary education" as:

> "instruction of academic grade, between the elementary grades and the college or university."

The Regulations of the New York State Commissioner of Education, and the by-laws of the respondent school board, defined an "elementary school", as (R16):

> "a school organized and conducted to give instruction in kindergarten and grades 1-6 in school systems organized on the 6-3-3 plan, or in kindergarten and grades 1-8 in school systems organized in the 8-4 plan."

Such Regulations and by-laws also defined "secondary schools", as follows (R17):

> "Secondary school means a school of academic grade between the elementary school and the college or university. Secondary schools shall be graded as junior high schools (organized unit including grades 7-9), middle high schools (one year of high school work above the eighth grade), high schools (organized unit including grades 7-12, 9-12 or 10-12) * * *."

Respondent's by-laws prescribed qualifications of education and experience to serve as principal in elementary schools giving instruction in grades 1 to 8 and kindergarten. Respondent conducted written and oral examinations of applicants to determine their qualifications for such service, and it issued licenses to those who passed such examinations, which licenses qualified them to serve as principals in such schools (R18).

Respondent's by-laws also prescribed qualifications for service as a junior high school principal, and it licensed applicants who passed examinations for such positions.

Respondent decided to change the organization of its public schools, such change to be made gradually, over a period of years (R18-19).

Beginning with the September, 1965, school year, 39 out of 138 junior high schools were converted by respondent to "intermediate schools", formed to give courses of study in grades 6 to 8 initially, and, eventually, in grades 5 to 8 (R58). The remaining 99 junior high schools continued to give instruction in grades 7 to 9 in the school year 1965-1966, but in subsequent school years some other junior high schools were converted to intermediate schools, so that at the present time there are 99 junior high schools, and 45 intermediate schools in New York City's school system.

On May 27, 1965, the aforesaid Regulations were amended to permit school districts to propose "an experiment concerned with organizational changes that alters the definition of the elementary, junior or senior high school"; and to permit school boards "to employ a * * * licensed teacher * * * for any teaching assignment, within the scope of the experiment * * *." (R57)

Thereupon, on June 14, 1965, the respondent adopted a resolution suspending any inconsistent provision of its by-laws, and assigning junior high school teachers and principals to serve in such 39 newly formed intermediate schools (R61-63).

Respondent's salary schedules prescribe a single salary schedule for all its teachers and separate single salary schedules for each title in the clerical and administrative staff, regardless of whether they serve in the elementary schools, the junior high schools, or the high schools (R14, R22).

Respondent's by-laws prescribe three different salary schedules applicable to principals in the elementary schools, the junior high schools, and the high schools. The salary schedule applicable to elementary school principals is lower by $1,010 per year than the salary schedule applicable to junior high school principals (R22).

Respondent has not adopted any qualifications, license or salary schedule applicable to principals in its intermediate schools (R23).

Alleging that there are no differences between the officially prescribed duties and qualifications of principals in elementary schools giving instruction in grades 1 to 8, or 1 to 6, and the duties and qualifications of principals in intermediate schools giving instruction in grades 6 to 8, or 5 to 8, the petitioners sued to eliminate this difference in salaries, on the ground that it is an arbitrary and unreasonable discrimination, which unconstitutionally deprives the petitioners of the equal protection of the laws, and of their property without due process of law. (R25-26).

B. Proceedings Below

On July 13, 1965, the three petitioners, who are employed as elementary school principals in respondent's public schools, instituted a class suit for themselves and about 580 other elementary school principals similarly situated, against the respondent school board.

The complaint alleged that by statutory definition, and in actual practice, public schools that gave instruction in grades 1 to 8, or 1 to 6, were elementary schools (R16-17); that by similar statutory and administrative definitions, only those public schools which gave instruction in at least one grade above grade 8 were classified as secondary schools (R17-18); that effective in September, 1965, the respondent would change some of its public schools, giving instruction in grades 7 to 9, from junior high schools to

"intermediate schools", by eliminating therein instruction in grade 9, and adding thereto instruction in grade 6 (R19-22); that respondent's salary schedules prescribe a single salary schedule applicable to all teachers, and single salary schedules applicable to clerical and administrative employees, regardless of whether they serve in the elementary schools, the junior high schools, or the high schools (R14; R22); that respondent's by-laws prescribe three different salary schedules applicable to principals in the elementary schools, the junior high schools, and the high schools (R22); that the salary schedule applicable to elementary school principles is lower by $1,010 per year than the salary schedule applicable to junior high school principals (R22); that respondent has not adopted any qualifications, license or salary schedule applicable to principals in its newly formed intermediate schools (R22), but, instead, it has assigned to such 39 newly formed intermediate schools, the same persons who formerly served in the same schools before they were converted from junior high schools to intermediate schools, and it paid salaries to such persons under the junior high school principals' salary schedule, which was greater by $1,010 annually than the elementary school principals' salary schedule (R22); that there are no differences between the officially prescribed duties and qualifications of principals in the said elementary and intermediate schools (R22-25); and that, consequently, the aforesaid difference of $1,010 annually between the pay of elementary and intermediate school principals was an arbitrary and unreasonable discrimination, which unconstitutionally deprived the petitioners of the equal protection of the laws, and of their property without due process of law (R25-26).

The respondent filed an answer which admitted the text of the Regulations of the State Commissioner of Education, and of its own by-laws, but denied the allegations that the payment of lower salaries to elementary school

principals than to intermediate school principals was in any way unlawful (R54-55).

Petitioners then moved for summary judgment in their favor, based on the pleadings and affidavits and exhibits in support of their contention that there was no difference in the officially prescribed duties and qualifications of principals in the elementary and intermediate schools (R11-15).

Respondent submitted an opposing affidavit by its acting Superintendent of Schools, in which he contended that there were differences between the duties and qualifications of principals in the elementary and intermediate schools (R59).

The Court heard oral argument on the motion, and after considering the pleadings and affidavits, it denied petitioners' motion for summary judgment in their favor, and granted judgment dismissing the complaint, without prejudice to any new suit which petitioners might be advised to initiate in the event of altered circumstances (R2-3).

The Court said that section 2(7) of the Education Law "supplies no definition of elementary or junior high schools" (R65); that the Regulations of the State Commissioner of Education "were effectively amended • • • and the inconsistent by-laws of the defendant were suspended by said Resolution" (R65).

The Court further said that "the policy of 'equal work, equal pay' is here inappropriately invoked for the purpose is to reorganize the learning process and to provide specialization, testing and guidance not heretofore available to elementary school students" (R67); that "the duties and functions contemplated for the principals of the 'intermediate' schools are quite different from those presently subsisting for principals of elementary schools" (R67); and, consequently, "the complaint is dismissed without prejudice to any new suit which plaintiffs may be

advised to initiate in the event of altered circumstances" (R68). Judgment dismissing the complaint was entered on March 25, 1966 (R2-3).

On October 31, 1966, the Appellate Division unanimously affirmed the dismissal of the complaint, and said that the administrative definitions of the elementary schools "have been suspended during the period of experiment with the intermediate schools and, therefore, it may not be said that an intermediate school is an elementary school by definition" (R73).

The Court further said: "Nor are the duties of an intermediate school principal the same as those of an elementary school principal" (R73); and that: "What is here involved is a discretionary power of the board to increase the salaries of these plaintiffs. An application to review the exercise of that discretion is properly made to the State Commissioner of Education and not to the courts" (R73).

On June 1, 1967, the New York Court of Appeals, without opinion, unanimously affirmed the aforesaid order of the Appellate Division.

Reasons for Granting the Writ

I.

The respondent school board has prescribed the same duties, and the same qualifications, for principals in its elementary schools which give instruction in grades 1 to 8, or 1 to 6, and in its intermediate schools which give instruction in grades 6 to 8, or 5 to 8.

The respondent school board can not, constitutionally, pay different and unequal salaries:

> "for public services of the same kind and character to men and women equally qualified according to standards which the state itself prescribes."

Alston v. *School Board of City of Norfolk*, 112 F. 2d 992, certiorari denied, 311 U. S. 693.

See, also, to the same effect: *Freeman* v. *County School Board*, 82 F. Supp. 443, affd. 171 F. 2d 702; *Whitmyer* v. *Lincoln Parish School Board*, 75 F. Supp. 686; *Thompson* v. *Gibbes*, 60 F. Supp. 872; *McDaniel* v. *Board of Public Instruction*, 39 F. Supp. 638; *Mills* v. *Board of Education*, 30 F. Supp. 245.

The cases cited above decided that fixation of higher pay for white teachers and principals in public schools, than for equally qualified Negro teachers and principals assigned to the same grades in the public schools, discriminated unconstitutionally against such Negro teachers and principals, and denied them the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

Except for racial discrimination, the same elements of arbitrary and unconstitutional discrimination are present in this case as in the above cited cases. The school board is paying lower salaries to elementary school principals than to intermediate school principals for the same services, for which both are equally qualified, under the standards prescribed by such school board.

The basis for the finding of arbitrary and unconstitutional discrimination in the cases cited above was that the same objective standard was not applied to the classification of the plaintiffs for pay purposes that was applied to other teachers, and not merely the fact that the plaintiffs in those cases were Negroes. This was pointed out in other cases which re-affirmed the constitutional prohibition of discrimination against Negroes on racial grounds, but sustained administrative actions which classified Negro teachers and principals in lower pay scales, or denied them re-employment upon abolition of teaching positions for reasons of economy, solely on the basis of objective evalu-

ations of their education, experience and teaching ability. *Brooks* v. *School District of City of Moberly, Missouri,* 267 F. 2d 733, certiorari denied 361 U. S. 894; *Reynolds* v. *Board of Public Instruction for Dade County, Florida,* 148 F. 2d 754, certiorari denied 326 U. S. 746; *Morris* v. *Williams,* 149 F. 2d 703.

The complaint alleges that the petitioner, Hermine J. Nelson, is serving as principal in P. S. 99, Brooklyn, which gives instruction in grades 1 to 8 and kindergarten; and that 30 other elementary school principals are similarly serving in similar elementary schools (R24). This is not denied (R55).

The elementary school principals serving in such 31 schools are clearly performing the same duties as the intermediate school principals. In addition to administering schools giving instruction in grades 6 to 8, or 5 to 8, their schools also give instruction in 5, or 4, other lower grades. Since their work is clearly identical, and even greater than the work of the intermediate school principals, the payment of lower salaries to them than to intermediate school principals is clearly an arbitrary and unconstitutional discrimination.

All elementary school principals passed competitive examinations of their qualifications to administer schools giving instruction in grades 1 to 8, and they were given licenses which expressly state that they are qualified to serve as principals in such schools.

The fact that some elementary school principals are now serving in schools giving instruction in grades 1 to 6 is immaterial, because they are subject to reassignment at any time to other schools giving instruction in grades 1 to 8.

The respondent has not prescribed any new license, limited to service as principal in schools giving instruction in grades 1 to 6.

Even if it had prescribed such a new license, section 235 of its by-laws provides (R22-23):

> "New qualifications for licenses shall not affect the validity of, or the range of employability under, licenses issued prior to the date such qualifications become effective; * * *."

In *Phelps* v. *Board of Education*, 300 U. S. 319, teachers' salaries were reduced, by dividing the salaries into several groups in order of the amounts thereof, and applying different reduction percentages to each such group, ascending from the lowest to the highest group. The claim that this method of reducing salaries deprived some teachers of the equal protection of the laws was overruled, even though there were some small incidental inequalities, because, "All in a given class were treated alike." 300 U. S. at 324. See, also: *Walsh* v. *School District of Philadelphia*, 343 Pa. 178, 22 A. 2d 909, 918.

In *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, it was decided that a State cannot repeal a statute granting indefinite employment contracts to teachers who have served five years in townships, while continuing such contracts as to similar teachers in other municipalites. The Court said that such a repeal "was not an exercise of the police power for the attainment of ends to which its exercise may properly be directed." We think this means that the repeal discriminated arbitrarily against teachers in townships, because it had no reasonable relation to any public interest or purpose.

In *Cotter* v. *City of Chelsea*, 329 Mass. 314, 317, 108 N. E. 2d 47, 49, the Court said:

> "When a public board sets up standards of pay not directly related to the work performed but varying with the private personal status of the employee it is treading upon dangerous ground."

II.

In an affidavit sworn to on December 7, 1965, the acting Superintendent of Schools attempted to differentiate between the elementary and intermediate schools, as follows (R59):

> "There are special syllabi being used for grades 6, 7 and 8, students are being instructed on a departmental basis, students are receiving instruction given by subject specialists, they are receiving shop training, all of which were present in the original junior high schools, but never present in an elementary school."

The reply affidavit of the petitioner, Dr. Irving A. Gladstone, stated (R35-36):

> "The claim that 'special syllabi' are used only in intermediate schools is not true. No 'special syllabi' for intermediate schools exist or are in use there. The Board's statement of April 22, 1965 (quoted in the complaint, par. 10), directed the Superintendent of Schools:
>
> 'to produce within the coming school year an intermediate program for introduction in September 1966'.
>
> A 'Summary of Major Recommendations of Intermediate School Committee', dated December 15, 1965, stated:
>
> 'The Intermediate School program will be introduced in a small number of pilot schools in September, 1966. In those schools, if possible, the new program will be introduced one grade at a time.'."

After we said that "No 'special syllabi' for intermediate schools exist or are in use there", respondent abandoned

its claim that there were such "special syllabi", and in its brief in the Court of Appeals it argued:

> "* * * the emphasis in the intermediate schools will be on instruction by subject specialists on a departmental basis (59). * * * This distinction is more than sufficient to meet the constitutional requirements for equal protection of the law."

The record shows that there are no differences in the courses of instruction in grades 6 to 8, between the elementary and intermediate schools, either in content, or in methods of instruction. Indeed, it could not be otherwise, because "the same text books and the same tests are being used in the 6th, 7th and 8th grades in K-6 and K-8 elementary schools, and in intermediate schools" (R35; R9). This is not denied or disputed.

The record further shows (R9):

> "use of personnel with elementary school teaching experience as instructors in training courses given to junior high teachers reassigned to intermediate schools, to familiarize them with methods of teaching 6th grade subjects; and (4) transfer of 6th, 7th and 8th grade pupils between K-6, K-8 and intermediate schools, without any change in their courses of study or in their scholastic achievements or standing."

The report of respondent's "Intermediate School Committee", dated December 15, 1965, stated (R41):

> "Provision will be made to staff the schools with the present supply of junior high school teachers and with teachers having common branch licenses now teaching in elementary schools who may have a concentration in subject areas."

The same report further stated (R40):

> "Based on a Prekindergarten-12 sequence, the curriculum will include the commonly-accepted subject areas. A degree of specialization will be introduced with subject chairmen and teachers expert in subject areas. Correlation of subject areas will be used as in the humanities (art, music, literature), and in the area of home living for urban society (industrial arts, home economics, health, safety, family living, consumer education). All children will study typewriting as early as is practicable. All pupils should be introduced to the study of foreign languages in the Intermediate School. Where children have started a language in the Primary School, there will be provision for continuity."

The "specialization" in "subject areas" recommended above is substantially the same as that recommended in the report of respondent's "Primary School Committee", dated the same day, which stated (R49; R50):

> "The highlights of the curriculum include:
>
> —a strong emphasis on the oral aspects of language as a foundation for reading and writing.
>
> —the introduction of the more modern concepts of mathematics.
>
> —a social studies program built around large concepts and designed to progressively expand the child's horizons from family relationships to the interdependence of people, groups and nations.
>
> —study of foreign languages beginning in grade 3 for advanced achievers. Serious consideration should be given to including other pupils who have superior achievement in language arts. A maintenance program in the mother-tongue should be fostered for

those children for whom English is a second language.

—greater emphasis on directed physical activities in keeping with the nation-wide physical fitness program.

—a science program to develop factual understandings and habits of scientific thinking.

—opportunities for creative participation in a variety of art and music experiences.

—a human relations program in which subject matter from all areas will be utilized to develop a wholesome point of view toward all people.

Staffing

—An additional regular teacher for every four classes, modifying the present O.T.P. (other teaching positions) arrangement

—Special teachers of art, health education, library and music

—Other instructional personnel, as needed: N.E. (non English) coordinator, auxiliary teacher, speech teacher, reading teacher.

* * *

Other Personnel in Every Primary School

—Full-time guidance counselor plus the services of a psychologist and a social worker as needed. * * *"

The record also contains statements by elementary school principals, as follows (R46-47):

"a) Instruction on a departmental basis—

For years some of our 6th year children have been participating in the full departmental program of our 7th and 8th grades.

b) Also at times both reading and arithmetic have been departmentalized for Grade 6 and below.

c) At the present time our music and health education programs are departmentalized.

Item 3 Instruction by subject specialists—

In this school it is a practice to give instruction by subject specialists, namely in the areas of language arts, music, art, science, health education, wood-working shop and home economics (foods and clothing).

Item 4 Shop training

There are children in the 6th grade in this school receiving shop training and have received it in the past. In addition children in Grades Kindergarten through 6th are currently receiving shop training in foods and clothing as part of the Home Living program of the Home Economics Department of the Board of Education."

We submit that the record clearly shows that the claimed distinction does not exist, because instruction by subject specialists on a departmental basis is given in the same subjects in grades 6 to 8, in both elementary and intermediate schools.

We submit further that if a valid distinction could be made on the basis of the use of departmentalized instruction by subject specialists in the intermediate schools, but not in the elementary schools, then, in any event, the record demonstrated a substantial triable issue on this subject, which required a trial for its determination. Consequently, the complaint should not have been dismissed summarily, on conflicting affidavits, without a trial.

However, we submit further than even if departmentalized instruction by subject specialists were used only in the intermediate schools, and not in the elementary schools,

this would not be a relevant or substantial difference, in the face of the undisputed facts that elementary and intermediate school principals both administer schools that give instruction in grades 6 to 8, using the same text books, and the same tests, and pupils are transferred in grade between such schools.

Departmentalized instruction by subject specialists is only a method of operation—a tool used to accomplish a result.

With or without departmentalized instruction by subject specialists, pupils in grades 6 to 8 in the elementary schools receive exactly the same instruction as pupils in grades 6 to 8 in intermediate schools. They are given the same tests, and they are required to demonstrate the same degree of knowledge of the same subjects of instruction in both types of schools; and when they do so, the respondent gives them exactly the same diploma certifying that they satisfactorily completed exactly the same courses of instruction; and the respondent itself accepts such diplomas as equivalent in all respects for admission to its high schools.

In an analogous case, the New York Court of Appeals decided that use of different tools to accomplish the same result is not a valid basis for differentiating between applicants in a competitive civil service examination for Court Stenographer who took dictation with a pen, and those who took dictation with a stenotype machine. *People ex rel. Sweeney* v. *Rice,* 279 N. Y. 70, 73.

In this case, it cannot be said that the alleged use of departmentalized instruction by subject specialists in the intermediate schools has any substantial relation to the courses of instruction given to pupils therein, by improving their knowledge of the subjects of instruction, or in any other way.

Consequently, even if this claimed difference existed, it would be an irrelevant and insubstantial difference, which

would not justify the classification of elementary school principals in a lower pay scale than intermediate school principals.

III.

The Appellate Division said that the administrative definitions of the elementary schools were suspended by an amendment of the Regulations of the State Commissioner of Education,

> "and, therefore, it may not be said that an intermediate school is an elementary school by definition." (R73)

Assuming that the amended Regulation suspended the administrative definitions of the elementary schools, this would not aid the respondent. The nature of instruction in grades 6 to 8 was not changed by any such suspension of the administrative definitions.

Calling some of the schools giving instruction in grades 6 to 8 "intermediate" schools, did not, and could not change their nature, or their status as elementary schools.

Even without any definition or classification, the instruction in grades 6 to 8 would still be the same in both the elementary and intermediate schools, because it is undisputed that the same text books, and the same tests are used in such grades in both elementary and intermediate schools, and pupils are transferred in grade between such schools.

Consequently, even without any administrative definitions, there would still be no basis for different pay classifications of elementary and intermediate school principals who administer schools giving instruction in grades 6 to 8.

Actually, the amended Regulation did not suspend the administrative definitions. It only authorized out-of-license employment of teachers "for any teaching assignment, within the scope of the experiment" (R57).

If the administrative definitions had been suspended, it would not have been necessary to authorize such out-of-license employment of teachers and principals.

Even if the administrative definitions had been suspended, this would not affect or suspend the statutory definition of the "elementary grades" as the grades which are below the "academic grade". Education Law, section 2(7).

Even if both the administrative and statutory definitions had been suspended, this still would not change the nature of the studies in grades 6 to 8. They would continue to be elementary grade studies, because they are below "academic grade". Completion of studies in grade 8 is necessarily followed by studies in grade 9, which is the lowest "academic grade". An "academy" is an institution for studies next below collegiate grade, and completion of studies therein is followed by "admission to colleges". Education Law, section 2(1); section 209.

Respondent does not claim that its new "intermediate" schools are not elementary schools, or that they are junior high schools. Its acting Superintendent of Schools admitted that its new intermediate schools are not "within the old definition of a junior high school" (R59).

IV.

The Appellate Division said (R73):

> "What is here involved is a discretionary power of the board to increase the salaries of these plaintiffs. An application to review the exercise of that discretion is properly made to the State Commissioner of Education and not to the courts."

We submit that the petitioners are not seeking to review a refusal to exercise in their favor a discretionary power to increase their pay. Instead, they are claiming a con-

stitutional right to equalization of their pay with the pay of intermediate school principals, on the ground that the respondent itself has prescribed the same duties, and the same qualifications for both such positions; and that, consequently, the failure to give them equal pay for equal work, unconstitutionally denies them the equal protection of the laws.

The New York courts have held that exhaustion of an administrative remedy by appeal to the State Commissioner of Education is not a condition precedent to suit in the New York courts to enforce a claimed constitutional or statutory right. *Leeds* v. *Board of Education*, 19 Misc. 2d 860, 190 N.Y.S. 2d 127, affd. 9 A. D. 2d 905, 195 N.Y.S. 2d 604.

V.

The Special Term of the New York Supreme Court said (R66):

> "* * * an employee is entitled only to the salary schedule which his license grants * * *."

But the petitioners are not seeking a junior high school principal's pay, under the junior high school principal's salary schedule, for their work as elementary school principals.

Instead, they are seeking the same pay that respondent is giving to intermediate school principals for administering schools giving instruction in grades 6 to 8, which the petitioners are licensed to administer, and some of the petitioners are actually administering schools giving instruction in grades 6 to 8, and in 5 other lower grades.

Consequently, it is illogical to say that petitioners are seeking a pay scale not applicable to their license, when it is the intermediate school principals who have no license as elementary school principals, but only as junior high school principals, and they are serving out-of-license ad-

ministering schools giving instruction in grades 6 to 8, such out-of-license assignments having been authorized by amending the Regulations of the State Commissioner of Education, and by suspending the by-laws of the respondent school board.

Payment of greater salaries to intermediate school principals than to elementary school principals can not be justified on the ground that those now serving as intermediate school principals have a junior high school principal's license, and they are serving out-of-license as intermediate school principals.

The amended Regulation, and the suspended by-laws, should be given the same effect on the salary schedules of both elementary and intermediate school principals. They should not be given the effect of suspending application of the junior high school principals' salary scale only to junior high school principals and thereby permitting extension of its application to intermediate school principals, while it continues the application of the elementary school principals' salary scale to them, and thereby bars them from receiving the same pay as intermediate school principals, for doing the same work.

In short, teaching licenses, and assignments of licensees to work out-of-license, should not be used as a technical device for paying lower salaries to those who perform "in license" exactly the same work that others perform "out-of-license".

VI.

"Facts and Figures 1964-1965" (p. 57), published by respondent, listed 584 elementary schools, 138 junior high schools, 58 academic high schools, 29 vocational high schools, 40 other special schools, making a total of 850 schools, on October 1, 1964.

The acting Superintendent of Schools said that beginning in September, 1965, "approximately 39 junior high

schools were reorganized in accordance with the aforesaid plan" (R58), as intermediate schools.

In September, 1967, there were 45 intermediate schools, 99 junior high schools, 615 elementary schools, 47 special schools, and 86 academic, vocational and special high schools, a total of 887 public schools in New York City.

The judgment dismissing the complaint provided that the dismissal of the complaint shall be "without prejudice to any new suit which plaintiffs may be advised to initiate in the event of altered circumstances" (R3).

We submit that there is no reason why petitioners should be denied equalization of salaries at the present time. The re-organization of New York City's public schools has been going on since September, 1965. The inequality between petitioners' salaries and the salaries of intermediate school principals has existed since September, 1965, a period of two years.

The "experiment concerned with organizational changes that alters the definition of the elementary, junior or senior high school" (R57), when completed, will result in the assignment of more elementary than junior high school principals to the intermediate schools. About 40% of the 615 elementary schools will be converted to intermediate schools, while there were originally only 138 junior high schools for conversion to intermediate schools.

Calling such system-wide organizational changes an "experiment" can not, and does not relieve the school board of its constitutional obligation to pay the same salaries for service in positions for which it has prescribed the same duties, and the same qualifications.

While these changes are going on, elementary school principals now have the same duties and qualifications as intermediate school principals. The school board has not prescribed any license, qualifications or salary schedule applicable to intermediate school principals, thereby recog-

nizing that they are in the elementary school principals' license area.

Therefore, there is no valid reason for relieving the school board of its present constitutional obligation to equalize the pay of elementary and intermediate school principals, for service in positions for which it has prescribed the same duties, and the same qualifications; nor for requiring the petitioners to wait until "altered circumstances" occur in the near future, after all the junior high schools have been converted to intermediate schools, and the school board begins to convert some elementary schools to intermediate schools.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 21, 1967.

Respectfully submitted,

MORRIS WEISSBERG,
Attorney for Petitioner.

Order of Affirmance.

No. 4

(1967)

COURT OF APPEALS

State of New York, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 1st day of June in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur: June 1, 1967.

---

2. No. 4. 67

IRVING A. GLADSTONE, & ors., &c.,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BE IT REMEMBERED, That on the 7th day of January in the year of our Lord one thousand nine hundred and sixty-

seven, Irving A. Gladstone, & ors., &c., the appellants in this cause, came here unto the Court of Appeals, by Morris Weissberg, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Board of Education of the City of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by J. Lee Rankin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Morris Weissberg, of counsel for the appellants, and by Mr. Eric J. Byrne, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided,

to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals, Clerk's Office,
Albany, June 1, 1967.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON,
Clerk.

Order Extending Time to File Petition.

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. .....

IRVING A. GLADSTONE, HERMINE J. NELSON AND MICHAEL J. ROMANO, individually, etc.,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 30, 1967.

s/ HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 1st day of September, 1967.

Order Amending Remittitur.

COURT OF APPEALS,

STATE OF NEW YORK.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July, A. D. 1967.

Present, HON. STANLEY H. FULD, Chief Judge, presiding.

---

2 Mo. No. 689

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually and as President of New York City Elementary School Principals Association on behalf of its members,

Appellants,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitu-

tion of the United States, viz.: Plaintiffs contended that, in the payment to them for their services as elementary school principals of salaries which were lower than those paid to principals of newly created intermediate schools, they were deprived of the equal protection of the laws and of their property without due process of law in violation of their rights under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no constitutional impairment of any property rights of plaintiffs.

AND the Supreme Court of Kings County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

SUPREME COURT, U. S.
(38876)

OCT 21 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 651

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 651

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The petitioners seek to have this Court review by writ of certiorari an order of the Court of Appeals of the State of New York, entered on June 1, 1967, which unanimously affirmed without opinion the dismissal of petitioners' complaint, without prejudice to any new suit which petitioners might be advised to institute in the event of altered circumstances.

Question Presented

The Board of Education of the City of New York has initiated an experimental program replacing a number of junior high schools (grades 7-9) with intermediate schools (grades 5-8), and has reassigned the principals of the junior high schools as principals of the intermediate schools. Junior high school principals are paid $1,000 more in salary per year than the principals of the present elementary schools (grades 1-6 or grades 1-8). The question presented is whether the Board of Education discriminated against the principals of elementary schools by paying the intermediate school principals the same rate of pay as they had been receiving as junior high school principals, in violation of the equal protection clause of the Constitution.

Facts

Prior to September 1965, the New York City schools were organized either under the traditional 8-4 system or under the newer 6-3-3 system (R. 6, 57). Under the 8-4 system, elementary schools gave instruction in grades 1 through 8 and kindergarten, and academic and vocational high schools gave instruction in grades 9 through 12 (R. 6, 16-17). Under the 6-3-3 system, elementary schools gave instruction in grades 1 through 6 and kindergarten; junior high schools gave instruction in grades 7 through 9; and academic and vocational high schools gave instruction in grades 10 through 12 (R. 6, 16-17).

On or about April 28, 1965, the defendant, the Board of Education of the City of New York, adopted a resolution which called for a reorganization of the New York City School System (R. 56). It proposed that the 8-4 and 6-3-3 systems be changed initially to a 5-3-4 system and then eventually to a 4-4-4 system (R. 20-22, 56-57). Under the proposed change, "primary" schools would give instruc-

tion in kindergarten and in grades 1 through 4 or 5; "intermediate" schools, replacing junior high schools, would begin instruction in grades 5 or 6 and continue through grade 8; and high schools would give instruction in grades 9 through 12.

On May 27, 1965, as a result of a request by defendant and of similar requests by other school districts, the New York State Board of Regents amended Article XV, Section 117, of the Regulations of the State Commissioner of Education (R. 57). The amendment permitted any school district, upon approval of its Board of Education and the Commissioner of Education, to experiment for a five-year period with organizational changes that altered the definition of an elementary, junior and senior high school; and to employ certified or licensed teachers for any teaching assignment within the scope of the experiment for which the teachers were deemed qualified by education and experience (R. 57).

On June 14, 1965, defendant adopted a resolution affirming its approval of the reorganization plan and suspending any of its bylaws which were inconsistent with the new program (R. 58, 61-62). On July 12, 1965, the Commissioner of Education approved the proposed plan for a two year period beginning on July 1, 1965 (R. 58-63).

Beginning with the September 1965 school year, approximately thirty-nine junior high schools in New York City were converted to intermediate schools under the experimental program (R. 58). Licensed junior high school principals were assigned as principals of the new intermediate schools and were paid in accordance with the salary scale of junior high school principals (R. 22-23, 59). The salaries of junior high school principals are $1,000 more in amount per year than the salaries of elementary school principals (R. 22).

Petitioners in this action are principals of elementary schools which give instruction from kindergarten through

grade 6 or through grade 8 (R. 16). They are paid in accordance with the salary scale of elementary school principals (R. 22).

Petitioners in this proceeding allege that the intermediate schools are, in fact, elementary schools by definition and in actual practice, and that, consequently, the fixation of higher salaries for intermediate school principals than for elementary school principals constitutes an arbitrary and unreasonable discrimination against the plaintiffs in violation of the equal protection and due process clauses of the Constitution. They, therefore, seek to have their salaries, as elementary school principals, fixed at the same amount as is provided for intermediate school principals.

In an answering affidavit, Dr. Bernard E. Donovan, the defendant's Superintendent of Schools, stated in pertinent part (R. 59):

> "16—It must also be pointed out that the 'Intermediate' schools which plaintiffs are complaining about, while not falling within the old definition of a junior high school, nevertheless are being operated in the same manner as were the old junior high schools. There are special syllabi being used for grades 6, 7 and 8, students are being instructed on a departmental basis, students are receiving instruction given by subject specialists, they are receiving shop training, all of which were present in the original junior high schools, but never present in an elementary school.
>
> "17—In addition junior high school teachers are licensed specially in specific subjects after having taken examinations specifically geared to test their proficiency in the subject specialty, whereas elementary school teachers are tested in common branches only. As a result thereof junior high school principals are those who have been tested as to their ability to supervise teachers who are licensed in special subjects as well as his ability to administer a school on the basis

of subject specialty, departmental instruction, shop courses, as outlined in paragraph '16', supra."

The Supreme Court, Kings County, dismissed the complaint, holding that the intermediate schools were not elementary schools by definition, and that the duties and functions contemplated for principals of intermediate schools were quite different from those presently subsisting for principals of elementary schools. The Appellate Division, Second Department, and the Court of Appeals of New York State unanimously affirmed.

ARGUMENT

Intermediate schools are not the same as elementary schools either by definition or in actual practice. Consequently, the fixation of higher salaries for intermediate school principals than for elementary school principals did not offend the equal protection or due process clauses of the Constitution.

(1)

There can be no serious question that the intermediate school is authorized under New York law and that the intermediate schools are not elementary schools by definition. The Board of Regents, which is empowered under Section 207 of the Education Law to exercise legislative functions concerning the educational system of New York State, amended the regulations of the Commissioner of Education to authorize the defendant to experiment with organizational changes that altered the definition of an elementary, junior and senior high school. (See text of amendment, Petition, pp. 3-4.) Defendant itself suspended all of its bylaws which were inconsistent with the proposed plan.

Section 2(7) of the Education Law does not represent a legislative policy which would prohibit the present reor-

ganization of the school system, as petitioners argue (Petition, p. 22). That section merely states that the term "secondary education", as used in the Education Law, means "instruction of academic grade, between the elementary grades and the college or university". It does not define elementary schools, merely referring to the elementary grades as preceding secondary education. Undoubtedly the elementary grades referred to are grades 1 through 8. This does not mean that there cannot be different types of schools for the elementary grades, that there cannot be different types of teaching in a separate school for the higher elementary grades, or that higher salaries cannot be paid to principals qualified to supervise the different type of teaching in the schools for such higher grades.

(2)

A classification established by law will not be set aside if any state of facts may reasonably be conceived to justify it. *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961). One who assails a classification has the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78-79 (1911). Salary distinctions may be made even for identical positions if the distinctions are based on proper objectives. *Kavanagh* v. *Brown,* 206 Fed. Supp. 479 (D. Mich., 1962), aff'd 371 U. S. 35 (1962).

It is clear that the intermediate schools are different from the elementary schools in actual practice and that, consequently, the salary differentiation here in question does not offend the equal protection or due process clauses of the Constitution.

The differences between the intermediate school and the elementary school are essentially those which distinguish the junior high school from the elementary school. Instead of one teacher teaching a class all or most of the time, the intermediate school, like the junior high school, is

operated on a departmental basis with instruction given by subject specialists (R. 59). In addition, the intermediate school students, unlike elementary school students but like those in junior high schools, are given shop training (R. 59).

As noted in *Matter of Brady* v. *Board of Education*, 136 Misc. 1, 6, 239 N. Y. Supp. 642, 648 (Sup. Ct., N. Y. Co., 1930), aff'd 229 App. Div. 853, 243 N. Y. Supp. 806 (1st Dept., 1930), the most common feature of the junior high school is the departmental method, which is defined as " 'the assignment of subjects to teachers so as to permit at least some measure of specialization, in contrast with the unspecialized teaching formerly universal in upper grammar schools.' " Under the new intermediate school program, the emphasis on specialization will begin in the fifth and sixth grades in intermediate schools instead of in the seventh grade in junior high school.

Because junior high school principals have been tested as to their ability to supervise teachers who are licensed in specific subjects and as to their ability to administer a school on the basis of subject specialty and departmental instruction, they, and not elementary school principals, have been reassigned as principals of the intermediate schools (R. 59). Whereas junior high school teachers take examinations which are specifically geared to test their proficiency in a subject speciality, elementary school teachers are licensed in common branches only (R. 59).

Petitioners assert that the same specialization exists in the sixth, seventh and eighth grades of both the elementary and intermediate schools (Petition, p. 19). There is only limited support for this contention in the record. For the most part there are only statements concerning limited specialization in these elementary schools classes. (See Petition, pp. 17-19.) Even assuming that the specialization and departmentalization in the sixth, seventh and eighth grades were identical with that of the intermediate

schools, there would still be a substantial difference between the duties of an elementary school principal and those of an intermediate school principal.

The elementary schools are comprised of many grades, namely, kindergarten and grades 1 through 5, which are not devoted to specialized treatment of subject matter. Furthermore, of the approximately 600 elementary schools in New York City, apparently only 31 extend through the seventh and eighth grades. Thus, the specialization that exists in the bulk of the elementary schools is negligible when compared with the specialization that exists in the intermediate schools.

Moreover, intermediate school principals are being paid the salary to which their junior high school principal's licenses entitle them, while petitioners are being paid the salary to which their elementary school principal's licenses entitle them. Under New York law, the license held, not the work performed, determines the salary to be paid. See *Thomas* v. *Board of Education,* 201 N. Y. 457, 94 N. E. 1082 (1911); *Hazen* v. *Board of Education,* 127 App. Div. 235, 111 N. Y. Supp. 337 (2d Dept., 1908); *Hoefling* v. *Board of Education,* 120 App. Div. 545, 104 N. Y. Supp. 941 (2d Dept., 1907); *Bacon* v. *Board of Education,* 205 Misc. 73, 122 N.Y.S. 2d 98 (Sup. St., N. Y. Co., 1953), aff'd 285 App. Div. 1046, 141 N.Y.S. 2d 508 (1st Dept., 1953), lv. den. 309 N. Y. 1030 (1955).

The New York Court of Appeals has upheld the legality of pay schedules granting higher salaries to junior high school principals than to elementary school principals and granting higher salaries to senior high school principals than to junior high school principals. *Matter of Lapolla* v. *Board of Education,* 195 Misc. 651, 90 N.Y.S. 2d 424 (Sup. Ct., N. Y. Co., 1949), aff'd 275 App. Div. 1038, 92 N.Y.S. 2d 419 (1st Dept., 1949), aff'd 301 N. Y. 580, N. E. 2d 490 (1950); *Matter of Burns* v. *Board of Education,* 301 N. Y. 584, 93 N. E. 2d 491 (1950). Since intermediate

schools are being operated in the same manner as the junior high schools, the payment of higher salaries to intermediate school principals than to elementary school principals cannot be said to be an arbitrary discrimination.

The distinction between intermediate school principals and elementary school principals is more than sufficient to meet the constitutional requirements for equal protection of the law. See *Railway Express Agency* v. *New York*, 336 U. S. 106, 109-110 (1949); *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1944); *Phelps* v. *Board of Education*, 300 U. S. 319, 323-324 (1937); *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418 (1914).

CONCLUSION

The petition for a writ or certiorari should be denied.

October 20, 1967.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel,
Attorney for Respondent.

Stanley Buchsbaum,
Eric J. Byrne,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1967.

No. 651.

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

PETITIONERS' REPLY BRIEF.

MORRIS WEISSBERG,
Attorney for Petitioners,
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New York, N. Y. 10038
WO 4-0492.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 RE 2-6978—1967

(8434)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 651.

IRVING A. GLADSTONE, HERMINE J. NELSON and MICHAEL J. ROMANO, individually, and as President of New York City Elementary School Principals Association on behalf of its members,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

PETITIONERS' REPLY BRIEF.

I.

Respondent's brief (p. 6) cited *McGowan v. Maryland,* 366 U. S. 420. The decision in that case stated that a governmental classification which "rests on grounds wholly irrelevant to the achievement of the State's objectives," denies to citizens the equal protection of the laws. 366 U. S. at page 425.

Respondent's intermediate school curriculum committee stated the objectives of its intermediate schools, as follows (R39):

> "PURPOSE
>
> "The design for new intermediate or Middle Schools has been prepared in answer to the Board

> of Education's directive to develop a new program of education for the intermediate years. 'This period of education,' the Board pointed out, 'must take the child from his elementary concentration on basic skills to the use of those skills in the acquisition of knowledge and the development of human and social relationships.' * * * 'The intermediate school,' the Statement of Policy continued, 'will add an extra ingredient of excellence—the sharing of learning experiences and life values with other children of different races, nationalities and economic status.'"

Respondent's above quoted objective for its intermediate schools is stated in broad, general language.

Obviously, the classification of elementary school principals in a lower pay scale than intermediate school principals is wholly irrelevant to respondent's above quoted objective, because even the respondent does not claim that an intermediate school principal is better qualified than an elementary school principal to "add an extra ingredient of excellence—the sharing of learning experiences and life values with other children of different races, nationalities and economic status" (R39). These objectives of racial tolerance and promotion of racial integration in the public schools apply to all of respondent's public schools, and not merely to its 45 intermediate schools. Respondent's 615 elementary schools have more than ten times as many Negroes, Puerto Ricans and white pupils therein as its 45 intermediate schools. Clearly, this objective of the respondent is not limited to its 45 intermediate schools.

Respondent's brief (p. 7) seeks to justify its different pay classifications for elementary and intermediate school principals on a different ground from the above quoted purpose of the intermediate schools, as follows:

> "Under the new intermediate school program, the emphasis on specialization will begin in the fifth and sixth grades in intermediate schools instead of in the seventh grade in junior high school.
>
> "Because junior high school principals have been tested as to their ability to supervise teachers who are licensed in specific subjects and as to their ability to administer a school on the basis of subject specialty and departmental instruction, they, and not elementary school principals, have been reassigned as principals of the intermediate schools (R59)."

This argument is contrary to respondent's Statement of Policy, which downgraded, instead of praising, teaching methods in junior high schools, as follows (R20):

> "The forces which produced the junior high school are not all significant at this time. New priorities of educational need have emerged. The junior high school no longer serves as a terminal school for any large number of pupils. Shifts in the curriculum have radically changed the subject matter emphasis of intermediate grades."

The Board's above quoted evaluation of its junior high schools made no mention of the value of methods of instruction "on the basis of subject specialty and departmental instruction." This is clearly an afterthought, newly invented by respondent to meet the exigencies of this lawsuit.

Even if methods of instruction "on the basis of subject specialty and departmental instruction" were the stated objective of respondent's intermediate schools, this would not be a relevant or substantial difference between respondent's intermediate and elementary schools, because the record shows that the purpose of such "specialization" was not to improve the education of students in the intermediate school grades 6 to 8 over the education of students in grades 6 to 8 in the elementary schools; and the

respondent does not claim that this is the purpose or the result of instruction "on the basis of subject specialty and departmental instruction" in its intermediate schools.

The record shows beyond dispute that, with or without departmentalized instruction by subject specialists, students in grades 6 to 8 receive exactly the same instruction in both the elementary and intermediate schools. They use the same textbooks. They are given the same tests, which require them to demonstrate the same degree of knowledge of the same subjects; and, when they do so, respondent gives them the same diplomas, which it recognizes and accepts as equivalent in all respects for admission to its high schools.

Since respondent, itself, thus made no distinction between instruction in grades 6 to 8 in its elementary and intermediate schools, the claimed "departmentalized instruction by subject specialists" is irrelevant, as a basis for classifying elementary school principals in a lower pay scale than intermediate school principals.

II.

Respondent's brief (p. 7) stated that petitioners' contention that "the same specialization exists in the sixth, seventh and eighth grades of both the elementary and intermediate schools" has "only limited support * * * in the record," consisting of "statements concerning limited specialization in these elementary school classes."

The extensive quotations from the record in our petition herein (pp. 15-19) clearly show that the record fully supports our statement that the same specialization exists in grades 6 to 8 in both elementary and intermediate schools, and not merely "limited specialization" in such grades in the elementary schools.

In deciding petitioners' claims that their constitutional right to equal protection of the laws was violated, this Court will "decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc., v. Scurlock,* 347 U. S. 110, 121. See, also: *Napue v. Illinois,* 360 U. S. 264, 271-272; *Niemotko v. Maryland,* 340 U. S. 268, 271.

Since the state Court dismissed petitioners' complaint, without a trial, this Court may also leave open this factual issue, to allow the state Court to make the necessary findings, on remand, after a trial. *Merchants National Bank v. Richmond,* 256 U. S. 635, 638.

Such a remand would be necessary only if this Court shall decide that "departmentalized instruction by subject specialists" is a valid basis for making different pay classifications of principals in respondent's elementary and intermediate schools.

However, we submit that for the reasons stated in our petition, pages 19-20, even if departmentalized instruction by subject specialists were used only in respondent's intermediate schools, and not in its elementary schools, this would not be a relevant or substantial difference, in the face of the undisputed facts that elementary and intermediate school principals both administer schools that give instruction in grades 6 to 8, using the same textbooks; pupils are transferred in grade between such schools, and the result of the teaching in both types of schools is measured by the same tests to the same degree, and certified by the same diplomas, which the respondent itself accepts as equivalent in all respects for admission to its own high schools.

III.

Respondent's brief (p. 6) cited *Kavanagh v. Brown*, 206 F. Supp. 479, aff'd 371 U. S. 35. That case decided that a state constitutional provision barring an increase in the salary of an incumbent Judge of a state court, during his fixed term of office, provided a reasonable basis for withholding a newly enacted statutory salary increase from an incumbent Judge during his fixed term of office; and that application of such salary increase to other Judges in the same state court, whose term of office began after the enactment of such statute, did not deny to incumbent Judges the equal protection of the laws.

In this case, unlike the *Kavanagh* case, no constitutional or statutory provision of the State of New York bars the immediate equalization of petitioners' salaries with the salaries of intermediate school principals. Therefore, the *Kavanagh* case has no application to the facts in this case. The clear implication of the *Kavanagh* case is that but for the constitutional provision barring an increase in the salary of an incumbent Judge during his fixed term of office, the constitutional provision for equal protection of the laws would entitle incumbent Judges to the same salaries as new Judges whose term of office began after the enactment of such statute.

In *Matter of Benvenga v. LaGuardia*, 294 N. Y. 526, the New York Court of Appeals decided that a statute that authorized the City of New York to increase local supplemental salaries of Justices of the State's Supreme Court elected in such city, applied to newly elected Justices, as well as to incumbent Justices; and that the City of New York could not withhold such increases from newly elected Justices of the State's Supreme Court. The *Benvenga* case involved no question concerning a constitutional bar to increasing salaries of incumbent Judges.

The New York Court of Appeals there said that "the statute evidences the legislative desire to assure a *non-discriminatory* and an *unreduced* compensation to *all* the Justices elected in the first and second districts" (294 N. Y. at p. 532, italics by the Court).

Respondent's brief (p. 8) also cited *Thomson v. Board of Education*, 201 N. Y. 457, as holding that "the license held, not the work performed, determines the salary to be paid." This is not what the Court decided in the *Thomson* case, in which the Court decided that:

> "* * * a municipal officer, who has been unlawfully removed from his position and has acquiesced in the removal, cannot recover the salary incident thereto during the period in which he has performed no service" (p. 460).
>
> "* * * the right to a position or office is what determines the right to the salary incident thereto, and that a person who regularly holds a place in one grade and performs the duties of a higher grade to which he has not been regularly appointed, does not thereby become entitled to the salary of the higher grade" (pp. 465-466).

The principles quoted above have no application to the facts in this case. The petitioners were not removed from office, and their petition herein does not seek to recover pay for a period of time during which they performed no service.

The petitioners were regularly appointed as elementary school principals. They do not seek "the salary of the higher grade" of junior high school principal, and they do not allege that without regular appointment they performed the duties of a junior high school principal. Instead, their complaint alleges that petitioners were regularly appointed as elementary school principals; that intermediate school principals are performing duties as elementary school principals and receiving greater pay

therefor than elementary school principals; and it seeks equalization of petitioners' pay with the pay of intermediate school principals, as elementary school principals, and not as junior high school principals.

Therefore, the *Thomson* case (201 N. Y. 457), as well as the *Hazen, Hoefling* and *Bacon* cases (127 App. Div. 235; 120 App. Div. 545; 205 Misc. 73, aff'd 285 App. Div. 1046, leave to appeal denied 309 N. Y. 1030), are irrelevant to the facts in this case, because this case, unlike the cited cases, involves a claim for equalization of salary in a position to which the petitioners were regularly appointed, and it does not involve any claim to salary applicable to a different position to which the petitioners were not regularly appointed.

Respondent's brief (p. 8) also cited the *Lapolla* and *Burns* cases (301 N. Y. 580; 301 N. Y. 584) as sustaining "the legality of pay schedules granting higher salaries to junior high school principals than to elementary school principals and granting higher salaries to senior high school principals than to junior high school principals."

But, as noted above, the petitioners are not seeking the pay of junior high school principals, or the pay of senior high school principals. Instead, they seek only equalization of their pay as elementary school principals with the pay of intermediate school principals, who administer schools giving instruction in the same grades 6 to 8, which the petitioners are licensed to administer, and all the petitioners administer schools giving instruction in grade 6, as well as grades 1 to 5, and some of the petitioners administer schools giving instruction in grades 6 to 8, as well as grades 1 to 5.

In our petition (pp. 23-24), we said that it is illogical for respondent to argue that petitioners are seeking a pay scale not applicable to elementary school principals, when

it is the intermediate school principals who have no license as elementary school principals and no salary scale applicable to intermediate schools, and they are serving out-of-license in the intermediate schools, and receiving more pay for their out-of-license work than petitioners receive for their "in license" work administering schools that teach the same grades 6 to 8 as the intermediate schools.

CONCLUSION.

The petition for a writ of certiorari should be granted.

October 30, 1967.

Respectfully submitted,

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